SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 967.

JOSEPH F. MAGGIO,

Petitioner,

vs.

RAYMOND ZEITZ, AS TRUSTEE IN BANKRUPTCY OF LUMA CAMERA SERVICE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAX SCHWARTZ,
Counsel for Petitioner.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Joseph F. Maggio, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, to review the decree of that Court, filed November 11th, 1946 (R. 45), affirming the order of the District Court of the United States for the Southern District of New York, dated the 30th day of April, 1945 (R. 28-31). The order of the District Court adjudged Joseph F. Maggio, the petitioner, to be guilty of contempt of Court and directed that he be imprisoned until he shall have purged himself by complying with the turnover order entered August 9th, 1943, directing Joseph F. Maggio to

turn over to the trustee, merchandise of the value of $17,500.00 or the proceeds thereof.

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit, appears in the record at pages 37-45, and is reported in 157 F. 2(d) 951.

The opinion of the District Court is found in the record at pages 27-28 and has not as yet been officially reported.

Jurisdiction

The decree of the Circuit Court of Appeals for the Second Circuit sought to be reviewed, was filed on November 11th, 1946 (R. 45).

The jurisdiction of this Court is invoked under Section 23(c) of the Bankduptcy Act, as amended by the Act of June 22nd, 1938, C. 575, Sec. 1, 52 Stat. 854, 11 U. S. C. A. Sec. 47(a), and Sec. 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Sec. 1, 438 Stat. 938, 28 U. S. C. A. Sec. 347(a).

Summary Statement of Matters Involved

On April 23rd, 1942, Luma Camera Service, Inc., a corporation engaged in the business of selling photographic equipment and supplies, was adjudicated a bankrupt.

Joseph F. Maggio (hereinafter referred to as petitioner) had been its President, Director and Stockholder.

The bankrupt ceased to conduct business and executed a general assignment for the benefit of creditors on December 30th, 1941.

On January 18th, 1943, the trustee in bankruptcy, seeking a turnover order, filed a petition which alleged that in 1941, Maggio had taken a considerable amount of the company's merchandise and still had them in his possession.

Hearings pursuant to this petition were held before the Referee in May and June, 1943. At these hearings, Maggio testified he had never taken any merchandise or other assets of the bankrupt.

The trustee based his entire proceeding upon mathematical computations, particularly the inventory figure appearing in the books of the bankrupt as of January 1st, 1941, which said figure likewise appeared in a financial statement issued by the bankrupt as of December 31st, 1940 and signed by the petitioner. The trustee used this inventory figure as of January 1st, 1941, to wit, $30,889.95, knowing that the petitioner could only deny the correctness of this figure at the risk of admitting the issuance of a false financial statement and inviting a criminal proceeding against himself.

In this dilemma, the petitioner admitted the inventory figure as true and correct.

On the basis of evidence, consisting largely of the bankrupt's books and accounts, the Referee inferred and on August 9th, 1943, found an unexplained shortage of merchandise, with a value of $17,500.00.

The history of the inventory record as shown by the books and accounts of the bankrupt, was as follows:

1/1/36	$14,444.65	(Rec. 40)
1/1/37	14,997.24	(Rec. 42)
1/1/38	17,410.10	(Rec. 43)
1/1/39	18,880.09	(Rec. 43)
1/1/40	20,250.24	(Rec. 44)

In the light of these figures, it is obvious the bankrupt did not have an actual inventory on hand on January 1st, 1941 of $30,889.95.

There was no proof in the record as to what the actual physical inventory was on January 1st, 1941. The record is silent and no proof was offered as to when the merchan-

dise claimed to be unaccounted for, was last in the possession of the bankrupt or the petitioner or when it was removed and converted into cash.

Although no evidence was offered, the Referee found as a fact, that Maggio had taken the merchandise in November and December of 1941 and had failed to turn the same over to the trustee.

Although no evidence was offered that Maggio still possessed it on August 9th, 1943, the Referee further found as a fact, that he then did, and entered an order on the same day, August 9th, 1943, directing Maggio to turn over to the trustee, merchandise in the value of $17,500.00 or the proceeds of the sale thereof.

On petition to review, the District Court by an order of December 28th, 1943, affirmed the Referee's order. (See opinion in 57 F. Supp. 632.)

On appeal, the Circuit Court of Appeals affirmed the within opinion. See 145 F. 2(d) 241, (C. C. A. 2). Certiorari was denied. 324 U. S. 841.

On December 4th, 1944, the Referee ex parte certified that Maggio was in contempt for failure to comply with the turnover order.

The petitioner in answering and opposing affidavits, set forth facts with respect to his present inability to comply with the terms of the turnover order and also that since the entry of the turnover order, he had become afflicted with a physical disability, rendering him totally disabled and incapable of obtaining employment, by reason of which committment or imprisonment would be inimical to his health.

Without holding any hearing and on the petition of the trustee, the District Court on June 5th, 1945, entered an order (dated April 30th, 1945) adjudging the petitioner guilty of contempt for willfully and deliberately disobeying the turnover order, and committed the petitioner to jail

to be there confined and detained until he shall have purged himself of the contempt, by turning over to the trustee the merchandise valued at $17,500.00 or the proceeds thereof or until the further order of the Court.

In the turnover proceedings in May and June of 1943, the only evidence on the question of Maggio's ability to surrender the merchandise or its proceeds (other than his denial that he had never taken the merchandise), was the testimony of the petitioner that neither he nor members of his immediate family had any assets of value and that since the bankruptcy proceedings began, he had been working on defense jobs at a small salary.

In connection with the proceedings to punish for contempt, the opposing affidavits of the petitioner, set forth facts that the petitioner had continued to work until November 1944 for a salary of $170.00 per month and that this salary has been used for the support of his family, which included two dependents and that after November 1944, he had not been employed because of bad health and had received for a short time small sick leave and insurance benefits.

In the opposing affidavits (R. 19-21, 25-26), the petitioner said that for some time before November 1944, he had been suffering from a serious heart condition, which culminated in a series of heart attacks in November of 1944, so as to completely disable him. That he had been treated at least twice a week and sometimes oftener by a family physician and that he would submit to physical examinations by any doctor employed by the trustee or designated by the Court. To this affidavit was attached an affidavit of Dr. Maggio, to the effect that the bankrupt had a serious heart complaint.

Subsequently, as appears from the medical report attached to a motion for a stay on contempt from the order

of the District Court, the petitioner was found by the physicians of the Prudential Insurance Company, to be totally disabled and his claim for disability was recognized by the insurance company and the petitioner still continues and is presently receiving disability benefits.

No physicial examinations of the petitioner were made on behalf of the trustee or at the direction of the Judge, nor was any hearing held to determine the petitioner's physical condition or his present inability to comply.

From the contempt order entered June 5th, 1944, the petitioner appealed to the Circuit Court of Appeals from the Second Circuit which rendered its decision (R. 37-45), affirming the order of the District Court.

Questions Presented

Is not the punishment imposed by the Court repugnant to the Fifth Amendment of the Constitution of the United States which forbids deprivation of life, liberty and property without due process of law and to the Eighth Amendment of the Constitution of the United States which forbids cruel and unusual punishment?

Did the Court below err in failing to conduct a trial or hearing as to the present ability of the appellant to comply with and obey the order of the Court and as to whether imprisonment would be inimical to the life of the appellant?

May a contempt order, via a fiction founded on the presumption of continued possession, for failure to comply with a turnover order founded upon the same fiction, "presumption of continued possession," be substituted for a criminal prosecution so as to deprive a man of his basic constitutional right—the right of trial by jury?

Specification of Errors

The Circuit Court of Appeals erred:

1. In holding that an order adjudging the appellant in contempt might be founded upon the fiction of "presumption of continued possession," for the alleged failure of the appellant to comply with a turnover, which in turn was likewise based upon the very same fiction, where in fact, from the situation of the case, the inference of the presumption is not only unreasonable, but the Court itself is of the opinion that the appellant has not the ability to comply with the order and is being directed to do an impossibility and then to punish him for refusing to perform it.

2. In failing to give heed to the humane situation present in this case, to wit, the seriously impaired health of the appellant, which the Court found was clearly ignored by the District Court and which, if the proceedings had been in form what they are in fact, a criminal action under XI U. S. C. A. 52(b), the Court would have had the authority to consider and would have adjudged that the District Court abused its discretion in jailing the appellant in the light of his grave heart ailment.

Reasons Relied On for the Allowance of the Writ

The Circuit Court of Appeals in its opinion, clearly indicates that were this a case of first impression, it would have reversed the order under appeal and would not have accepted the reasoning upon which the same is founded.

The present contempt order was based upon the presumption of continued possession of the very same assets directed to be turned over by the original turnover order entered August 9th, 1943. This turnover order in turn, was likewise based upon the presumption of continued posses-

sion of assets, supposedly in the possession of the appellant in November and December of 1941.

Under the circumstances, the Circuit Court of Appeals was of the opinion that, (1) the invocation of the presumpton was highly unreasonable, contradicting any common, sensible interpretation of the facts and human motivations, and further, (2) the presumption of continued possession loses its force and effect as time intervenes and as the circumstances indicate, that the petitioner is no longer in possession of the missing goods or proceeds.

Here in fact, the trustee did not seek to have the petitioner surrender the goods or monies actually in his possession, but sought with the aid of fiction to have the Court punish him for a crime.

Nowhere in the Bankruptcy Act has Congress even intimated any intention to authorize the institution of turnover and contempt proceedings founded on the fiction of the presumption of continued possession, as the substitution for a criminal prosecution so as to deprive a man of his basic constitutional right—the right of trial by jury.

The Supreme Court has never decided in favor of the fictitious "presumption" invoked herein.

Here the order on appeal is based solely upon the presumption, despite its glaring departure from what any reasonable person would believe were the actual facts.

The Circuit Court of Appeals also erred in ignoring the seriously impaired health of the appellant, which the Court clearly admits was ignored by the District Court and which it would have taken into consideration had the proceedings been never what they are in fact, a criminal action under XI U. S. C. A. 52(b), in which event the Court would have had authority to consider whether in the light of the petitioner's grave heart ailment, the trial judge abused his discretion in jailing the petitioner.

It should be noted that a conflict between the Circuits now exists upon the questions involved herein, since in *Bruno* v. *Fraidin*, 149 F. 2(d) 325, (C. C. A. 4), the Fourth Circuit has repudiated the "presumption" doctrine.

The questions involved herein have arisen quite frequently in recent years in the various Circuits, with diverse results, and dissatisfaction has been expressed by the Courts as to the state of the law. The questions involved are vital in the administration of the Bankruptcy Act.

As the Supreme Court has never decided in favor of the fictitious "presumption" herein invoked and by reason of the conflict of decisions between the Circuits and in view of the nature of the decision of the Circuit Court of Appeals herein, it is respectfully urged that the questions involved should be settled by this Court.

ARGUMENT

POINT A

There is a conflict of decisions between the Circuits upon the sanctioning of the "presumption" fiction of the granting of contempt and turnover orders.

In *Brune* v. *Fraidin*, 149 F. (2d), (C. C. A. 4), the Fourth Circuit repudiated the presumption doctrine when carried to the extent required by the decisions in the Second Circuit, which decisions, however, the Second Circuit feels obliged to follow until the Supreme Court expresses its views upon the subject.

However, in the Second Circuit, fiction of presumption of continued possession was not invoked and was held not applicable in *In re Schoenberg*, (C. C. A. 2) 70 F. 2(d), 321 and in *In re West Produce Corporation*, (C. C. A. 2) 118 F. 2(d) 274, 277.

Apparently following, or in accord with the views of *Brune* v. *Fraidin*, 149 F. 2(d) 325, (C. C. A. 4), and contra to the views of the Circuit Court of Appeals for the Second Circuit, are the views expressed in *Price* v. *Kosmin*, 149 F. 2(d) 102, (C. C. A. 3); *In re Zappala*, (D. C. Pa.), 44 F. Supp. 353; *In re Satzberg*, (D. C. Pa.), 42 F. Supp. 282; *In re Peril* (D. C. Pa.), 31 F. Supp. 28; *Marin* v. *Ellis*, (C. C. A. 8), 15 F. 2 (d) 321; *In re J. L. Marks*, 85 F. 2(d) 392, (C. C. A. 7); *Samel* v. *Dodd*, (C. C. A. 5), 142 F. 68, 73; *Kirsner* v. *Taliaferro et al.*, (C. C. A. 4), 202 F. 51.

By reason of the conflict of decisions in the various Circuits and from the nature of the decision of the Circuit Court of Appeals for the Second Circuit herein, it is respectfully urged that this Court assume jurisdiction, grant the writ sought and determine the questions raised.

Point B

The order of the District Court, adjudging the petitioner, Maggio, in contempt, affirmed by the Circuit Court of Appeals, violates the Fifth and Eighth Amendments of the Constitution of the United States, in that the order deprives him of life or liberty without due process of law and said order imposes a cruel and unusual punishment upon the petitioner.

Althought urged both before the District Court and the Circuit Court of Appeals that the seriously impaired health of Maggio, the petitioner, should be taken into consideration, the Circuit Court of Appeals found,

(1) that the District Judge did ignore this issue;

(2) but that, if the proceedings were in form what they are in fact, a criminal action, it would have had to consider, in the light of Maggio's grave heart ailment, whether the trial judge abused his discretion in jailing Maggio;

(3) that although the Court knew Maggio could not comply with the turnover order, it must keep a straight face and pretend that he could and thus affirm the order which directs Maggio to do an impossibility and then punish him for refusal to perform it only by reason of the fact that the precedents of the Court keep it from abandoning the pretense which will lead to inhuman treatment of Maggio.

Clearly what is being done here to Maggio constitutes inhuman treatment and he is being meted out cruel and unusual punishment, as defined and within the decisions of *Weems* v. *United States*, 217 U. S. 349, 368; *United States ex rel. Brown* v. *Lederer*, (C. C. A. 7), 140 F. 2(d) 136, cert. den. 322 U. S. 734; *Wilkerson* v. *Utah*, 99 U. S. 130, 135; *In re Kemmler*, 136 U. S. 436, 446-7.

The District Court, without holding any trial, found and adjudged Maggio, the petitioner, to be in contempt of Court and directed that he be jailed. This punishment is so arbitrary as to deny him due process of law. The power of the Court to punish for contempt, should be used with caution and deliberation. *Redman* v. *United States*, (C. C. A. 9), 77 F. 2(d) 126, 127.

This Court, in *In re Michael*, — U. S. —, 66 S. Ct. 78, reiterated this principle, in interpreting various acts passed by Congress curtailing the range of conduct which Courts can punish for contempt.

Petitioner, Maggio, was entitled to a trial upon both the issue as to his present ability to comply with the turnover order, as well as the issue as to whether imprisonment would be inimical to his health before being found in contempt. *Oriel* v. *Russell*, 278 U. S. 358; *United States* v. *Jaeger*, (C. C. A. 2) 117 F. 2(d) 483, 488; *In re Sobel*, (C. C. A. 2) 242 F. 487; *In re Stavrahn* (C. C. A. 2) 174 F. 330; *In re Nevin*, 278 F. 601, 606-7; and *Cooke* v. *United States*, 267 U. S. 517, 537.

Furthermore, there should be some limitation in point of time for the institution of any contempt proceeding and as the contempt proceeding is based on a presumption which the Circuit Court of Appeals has found to be contrary to fact and one arising more than five years ago, the present proceeding should be deemed barred by reason of lapse of time and the dissipation of the presumption. *Prendergast*, 217 U. S. 412, 63 S. Ct. 268; and *In re Barton Brothers*, 149 F. 620 (D. C. Ark.).

Certainly a respondent in a Civil proceeding should not be subjected to greater punishment than would be meted out in a Criminal proceeding and this is what is precisely taking place herein, resulting in cruel and inhuman punishment being inflicted upon the petitioner, Maggio.

POINT C

A contempt proceeding via a fiction founded on the presumption of continued possession, entered for failure to comply with a turnover order founded upon the same conviction, may not be substituted for a criminal prosecution and the entry of such an order under such circumstances, is improper and should be vacated.

Neither a turnover order nor a contempt order should issue where it appears from the evidence that there is no reasonable probability of the continued possession or control of the missing property or its proceeds by the bankrupt, for it would be a futile thing to pass a turnover order which is primarily a contempt proceeding, when the latter could not properly result in imprisonment for failure of the bankrupt to comply. *In re Fraidin*, (D. C. Md.) 55 F. Supp. 129, Aff'd. *Brune* v. *Fraidin*, 149 F. 2(d) 325, (C. C. A. 4).

Where the Court is not sufficiently satisfied of the factual ability to make compliance, no contempt order should issue.

In re Rosser, (C. C. A. 8) 101 F. 562, 566, 568; and *Sheehan* v. *Hunter*, (C. C. A. 8) 133 F. 2(d) 303.

The Court should not enter a contempt order unless satisfied that the bankrupt, herein the petitioner, has the present ability to comply. *Kirsner* v. *Taliaferro*, (C. C. A. 4) 202 F. 51, 60-61; *In re Goldman*, 62 F. 2(d) 424, (C. C. A. 1); *Samel* v. *Dodd*, (C. C. A. 5) 142 F. 68, 73; *Stuart* v. *Reynolds*, 204 F. 709; *American Trust Co.* v. *Wallis*, 126 F. 464.

Oriel v. *Russell*, 278 U. S. 358, never decided in favor of the fictitious presumption herein invoked; *Robbins* v. *Gottbetter*, (C. C. A. 2) 134 F. 2(d) 843, 844. Here the contempt order was entered solely by reason of the decisions in the Second Circuit sanctioning the presumption fiction which constrained the Circuit Court on the previous appeal on the turnover order to decide without opinion, that the Referee had correctly rested his finding on the presumption, despite the finding of the Court, however, that the finding was a glaring departure from what any reasonable person would believe were the actual facts.

As the Circuit Court states, it knows the petitioner, Maggio, cannot comply with the order, but must pretend that he can and must thus affirm orders which first direct Maggio to do an impossibility and then punish him for refusal to perform it. The Circuit Court felt it was compelled to affirm the contempt order, solely by reason of the fact that its own precedents kept it from abandoning the pretense, which in this case it concedes, will lead to inhuman treatment of the petitioner, Maggio.

The history of this fiction in the Second Circuit Court of Appeals shows that the judges of that court have been divided with respect to it, and that that court has not maintained consistent rulings. In *Danish* v. *Sofranski*, 93 F. 2(d) 424, the court, consisting of Judges Manton, L. Hand and Swan, in an opinion by Judge L. Hand, virtually abandoned the fiction. At the next term, the Court now consist-

ing of Judges L. Hand, A. N. Hand and Chase, overruled Judge L. Hand's decision in the *Danish* case. See *In re Pinsky-Lapin Co.*, 93 F. 2(d) 777; Judge L. Hand concurred in an opinion criticizing the reasoning of the majority. In *Seligson* v. *Goldsmith*, 128 F. 2(d) 977, the Court, consisting of Judges L. Hand, Swan and Frank, in an opinion by Judge L. Hand, reluctantly adhered to the ruling in the *Pinsky-Lapin* case, obviously only because he and Judge Frank thought it undesirable to have the doctrine shift with each change in the composition of the Court. In *Robbins* v. *Gottbettor*, 134 F. 2(d) 843, the Court, consisting of Judges L. Hand, A. N. Hand and Frank, in an opinion by Judge L. Hand, stated that he and Judge Frank were highly critical of the fiction but acquiesced in the court's precedents. See also concurring opinion of Judge Frank in *Cohen* v. *Jeskowitz*, 144 F. 2(d) 39. The opinion in the instant case makes it clear that Judges L. Hand and Frank, if they had not felt obliged to adhere to the previous rulings, would have repudiated the fiction.

In the language of the Circuit Court of Appeals, "to eliminate the unfortunate results of the unreasonable fiction, we have adopted, it will be necessary for the Supreme Court to grant certiorari and then to wipe out our more recent precedents." In the circumstances of this case, the petitioner, Maggio, is worse off than if he had been criminally prosecuted.

This Court has said that a fiction must never be used to work injustice, or "to obscure the facts when they become important," or "when the fiction is unrelated to reality." *Curry* v. *McCanless*, 307 U. S. 357, 374; Story, N. in *U. S.* v. *Nineteen Hundred and Sixty Bags of Coffee*, 8 Cranch 398, 415; Holmes, J., in *Blackstone* v. *Miller*, 188 U. S. 189, 204; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 92; *Liverpool, etc. Ins. Co.* v. *Orleans Assessors*, 221

U. S. 345, 354. See also the discussion of fictions, and cases cited, in *Hammond-Knowlton* v. *U. S.*, 121 F. 2(d) 192, 199, 200 (C. C. A. 2).

Conclusion

It is therefore respectfully submitted that this case, by reason of the questions involved, the conflict of opinions in the various Circuits, the opinion of the Circuit Court of Appeals for the Second Circuit, is one calling for the exercise by this Court of its supervisory powers, in order that important questions in the administration of bankruptcy proceedings may be settled.

These questions should be finally determined by this Court and a definite determination made with respect to the application of the fiction of presumption of continued possession in turnover and contempt proceedings.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, sitting at New York, N. Y., commanding said Court to certify to and to send up to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings by the Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the order and decree of the Circuit Court of Appeals for the Second Judicial Circuit be reversed and that your petitioner be granted such other and further relief as may seem proper in the premises.

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